87-1995

Supreme Court, U.S.
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No. 87-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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EUGENE N. HOOPER,

*Petitioner,*

VS.

ANTHONY F. MUSOLINO, NORTH DUKE MALL LIMITED PARTNERSHIP, CHARLES S. WARNER, and JOHN W. WARNER,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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## QUESTIONS PRESENTED FOR REVIEW*

1. The Petitioner, Eugene N. Hooper, was forced to defend his actions as a General Contractor for North Duke Mall Limited Partnership in a suit in equity by a limited partner for an accounting of the partnership assets and liabilities. The trial court (Circuit Court of Fairfax County) by combining an unpleaded suit for negligence as general contractor with the pending equity action, deprived Mr. Hooper of an opportunity to defend himself and to have a jury of his peers.

2. The trial court (Circuit Court of Fairfax County) failed to conduct an accounting of the Partnership, and failed to credit Mr. Hooper's contributions to the Partnership thereby depriving him of due process of law.

3. The Supreme Court of Virginia misconstrued the law of North Carolina by a misinterpretation of the North Carolina Uniform Partnership Act, § 59-01, *et. seq.*, General Statutes of North Carolina. This error of law creates a conflict among the states, deprived petitioner of due process of law and further denied Hooper his right to have the unpleaded breach of contract claim tried by Jury.

4. Petitioner, forced to defend his actions as general contractor in a suit in equity for an accounting, was denied an opportunity to present evidence in his own defense. These rulings deny petitioner equal protection of the law and deprive him of property without due process of law.

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*The parties to this proceeding are Anthony F. Musolino, North Duke Mall Limited Partnership, Charles S. Warner and John W. Warner.

5. While this case is complex and lengthy, it does not follow that findings, fully contradicted by the evidence, can be forever used against the Petitioner without depriving him of his constitutionally protected day in court before a jury where he can assert his legal defenses.

6. Petitioner was forced into federal bankruptcy reorganization because he was unable to post a cash bond and could not review the bond in a timely fashion under state law, thereby depriving him of due process of law.

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## OPINIONS BELOW

The Judgment and Order of the Virginia Supreme Court (App. A, infra, 1a) and the Order of the Circuit Court (App. D, infra, 20a) below are not reported.

## OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

There are no official or unofficial reports published at this time.

## JURISDICTION

The judgment of the Supreme Court of Virginia was entered January 15, 1988. A timely petition for rehearing was denied March 4, 1988 (App. B, infra, 17a.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

## CONSTITUTIONAL PROVISIONS AND STATUTES

North Carolina Uniform Partnership Act, §§ 59-01, et *seq.*, General Statutes of North Carolina. The pertinent part of the Act. Section 59-10(b), is as follows:

> A limited partner shall have the right to receive share of the profits or other compensation by way of income, and to the return of his contribution as provided in G.S. §§ 59-10 and 59-16.

Fifth Amendment to United States Constitution; Seventh Amendment to United States Constitution; Fourteenth Amendment to United States Constitution.

## STATEMENT OF CASE

Petitioner Eugene N. Hooper ("Hooper"), respondent Anthony F. Musolino ("Musolino"), and respondent John W. Warner are partners in the North Duke Mall Limited Partnership, a North Carolina limited partnership ("the Partnership") which was formed in 1973 to develop a shopping mall in Durham, North Carolina. Hooper, a general and limited partner, invested and contributed more than $1,400,000 to the Partnership and owns a 60% interest. Musolino and John W. Warner, limited partners, together invested less than $350,000 and own a 40% interest. The Partnership failed and all partners lost their investment and contributions.

In August 1977, Musolino instituted a Chancery suit for an accounting of the Partnership in the Circuit Court of Fairfax County. The defendants were the Partnership, Charles S. Warner and Hooper. The case was referred to a Commissioner in Chancery who, after nine days of hearings, submitted a report on April 2, 1982, in which he reported, among other things, that Hooper was indebted to Musolino in the amount of Musolino's investment (approximately $150,000) in the Partnership. Both Hooper and Musolino filed exceptions to report after which the Circuit Court remanded the case to the Commissioner for further consideration. On October 11, 1983, the Commissioner belatedly filed his second report in which he reported that Hooper was indebted to the Partnership in amounts which totaled $8,430,000, plus interest.

On July 26, 1984, the Circuit Court ordered judgment against Hooper and in favor of the defendant

Partnership for $8,430,000.[1] The Court, recognizing that Hooper owned 60% of the Partnership, set bond for appeal at $3,372,000, the amount Hooper owes the Partnership. This amount, however, is ten times the total investment of less than $350,000—a windfall of more than $3,000,000. That result was unconscionable.[2]

An appeal from the final decree and judgment was taken to the Supreme Court of Virginia. On January 15, 1988, the court issued its opinion affirming in part, and reversing in part, the judgment of the Circuit Court. The final decree was modified to exclude $4,500,000 of the award for loss of partnership property and judgment was entered against Hooper in favor of the Partnership for $3,930,000.[3]A petition for rehearing was denied on March 4, 1988.

## REASON FOR GRANTING WRIT AND REVIEW OF STATE COURT JUDGMENTS

The Circuit Court erred when it affirmed a Commissioner Report which abandoned the action for an accounting and proceeded to find petitioner guilty of

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[1] Attorneys' fees and interest up to date of judgment were pressed by plaintiffs, but denied by the Court. This ruling was never appealed.

[2] As part of a workout agreement, Mr. Hooper purchased the 15% interest of Charles Warner, both general and limited partnership interests and issued a hold harmless to Charles Warner. This purchase fixed Hooper's interest at 60%.

[3] This partial relief which left the petitioner with 40% of $3,930,000 to pay the partnership was too late to save petitioner who was forced to seek reorganization when he was unable to bond his appeal. Petitioner now seeks to reorganize and leave bankruptcy court.

breach of contract. These issues were raised by exceptions to the Commissioner Report and by brief and argument to the Circuit Judge. See transcript of February 2, 1984, p. 1-16.

> "What initiated as a dissolution and an accounting pursuant to the Partnership code has arrived into some other form of action that I don't believe the Courts of the Commonwealth have ever seen or the statutes of the Commonwealth have ever authorized."

Tr., Feb. 2, 1984, p. 4.

> ". . . I think that that is material not only from a standpoint of whether this is a derivative suit as Mr. Bettius discussed. But even from a more fundamental question really of due process and procedures of court. The Court I am sure is well aware of the general language requiring pleadings pursuant to which the proof that you will put on will correspond."

*Supra*, p. 32.

Exceptions were also taken repeatedly to the lack of a fact finding jury and the burden of proof. All were denied. The record is replete with exceptions to the rulings.

## ARGUMENT

It is clear that petitioner was never able to defend himself in the proceedings below. It is acknowledged that the bizarre, outrageous result of double damages has been corrected by the Virginia Supreme Court. But it still leaves petitioner without due process. In

particular, he has not had his day in Court before a jury of his peers. He never was able to raise his defenses or counterclaims. There are simply no cases in Virginia or North Carolina where damages for breach of contract were awarded where defendant had no notice in the complaint.

It is clear to petitioner that the failure of the Bill of Complaint to give notice of a breach of contract suit prevented petitioner from exercising his right to demand a jury to hear the issue of breach of contract. Any construction of the statutes which denies petitioner his chance for a jury must be cause for action by this Court.

It is unchallenged that the Commissioner failed to conduct an accounting in this case. The Commissioner simply set damages as if he had tried a breach of contract case. By proceeding in this manner, he gave no weight to the balanced accounts presented, but simply affirmed an award that forced petitioner into receivership. An all cash bond for $3,372,000 was required, but could not be raised before execution on petitioner's property. It is undisputed that petitioner spent more than $1,400,000 of his own money to try to save this project from foreclosure. Even in foreclosure, he agreed to pay the lender an additional $330,000 to relieve the Partnership of its debt.

It is also uncontroverted in the record that petitioner spent all the funds he received from the Partnership to build the mall. How else could petitioner build a mall for $2,620,000 and have it sold at foreclosure for $4,500,000?

Petitioner is a general partner in a North Carolina Partnership. The law of North Carolina was used in

the Court below. The Supreme Court of Virginia held that the North Carolina Uniform Partnership Act allowed a limited partnership to receive damages in excess of income or contribution. This in face of the clear language of the statute:

> "A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and the return of his contribution as provided in G.S. 59-10 and 59-16."

(North Carolina Uniform Partnership Act, § 59-01, *et. seq.*, General Statutes of North Carolina.)

It is conceded there were no profits or other compensation by way of income. The statute clearly will not allow an equity court to award limited partners to receive damages for breach of contract in excess of their contributions in a case where there are no ". . . profits or other compensation." The court below has sanctioned an award for contract damages that is a significant departure from established partnership law and in the process has denied due process to petitioner and a trial by his peers. Petitioner was unable to assert defenses such as the poor design of the mall by Musolino causing a cost overrun and other defenses.

The measure of damages to a limited partner is equal to his capital contribution plus any lost profits he can show. This limited remedy is evidenced by North Carolina law. In *Roper v. Thomas*, 298 S.E.2d 424 (N.C. App. 1982) the facts were similar to those in the instant case. A limited partner had brought an action against the general partners to recover his investment in a limited partnership formed for con-

structing an apartment complex. The general contractor for the apartment complex was a corporation whose principal stockholders were the general partners. The court held that the plaintiffs were negligent in failing to obtain permanent financing before construction and failing to pay cost overruns, which resulted in foreclosure on the property. The damages awarded to the plaintiffs were their initial investment plus interest. This award was affirmed on appeal.

The facts in the instant case are remarkably similar to those in *Roper*. Therefore, the measure of damages should be the same return of the initial investment plus interest. There are no lost profits because the project was a financial failure.

In *Dycus v. Belco Industries, Inc.*, 569 P.2d 553 (C.A. Okla. 1977) the court awarded the same measure of damages as in *Roper*. This case involved the liquidation of a hotel owned by a limited partnership. The limited partner brought an action against the limited partnership and general partner for an accounting and damages after the partnership's dissolution. The general partner had sold the hotel, which was the sole asset of the partnership, after the hotel kept losing money. The general partner kept the proceeds of the sale as an offset of his losses and the limited partner sued. The court held that the limited partner was entitled to the return of his capital contribution.

The *Roper* and *Dycus* cases indicate the correct formula determining damages to the limited partner. The Commissioner's second report creates a windfall to the limited partners far in excess of their initial capital contribution. The damages awarded to the limited partners should be limited to their capital con-

tribution plus any lost profits they can prove.

The extent to which petitioner was denied due process in this case can be found in the finding that he commanded Parcel B to his own use. The facts were clear that the Partnership was running out of money and they had difficulty paying their bills. As a result, the general partners borrowed money on Parcel B. Those funds went to the Partnership. Subsequently, the bank foreclosed on Parcel B. Petitioner sought to buy Parcel B back for the Partnership. The bank refused, but did agree to sell the parcel to petitioner on his own guarantee. Petitioner purchased the parcel for the Partnership. When the entire project failed, Parcel B was foreclosed again, and petitioner was faced to pay a default for the property in excess of $30,000. For this, he is falsely accused of converting a partnership asset to his own use. Nothing could be further from the truth. Only a procedure that would disregard the settling of accounts, and apply damages in contract could explain a result, that at law before a jury, would never stand.

These and other findings were made in the contract action tried at equity where petitioner was denied due process and a jury.

Lastly, petitioner had no effective way under state law to review the bond in this case. There was simply no procedure available to review the merits of this case or the size of the bond. When the Supreme Court of Virginia finally acted, the judgment was reduced by $4,500,000, but too late to save petitioner from bankruptcy reorganization. The bond of $1,572,000, 40% of the judgment appealed from, could have been posted by petitioner, but the $3,370,000 bond required

by the trial court was beyond his capacity at that time. The failure of the state to provide a means to review the bond denied petitioner due process of law.

## CONCLUSION

It is requested that the Writ be issued to the Supreme Court of Virginia and that these important questions of law be fully briefed and argued in this court.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

Present: Carrico, C.J., Poff, Compton, Stephenson, Thomas, and Whiting, JJ., and Cochran, Retired Justice.

**Record No. 841603**

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EUGENE N. HOOPER
v.
ANTHONY F. MUSOLINO, *et al.*

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**OPINION BY JUSTICE RICHARD H. POFF**
January 15, 1988

**FROM THE CIRCUIT COURT OF FAIRFAX COUNTY**
**Richard J. Jamborsky, Judge**

This is an appeal from a judgment in a suit for an accounting. The final decree ordered Eugene N. Hooper to pay to North Duke Mall Limited Partnership (the partnership) the sum of $8,430,000 as damages resulting from Hooper's negligence in the conduct of the partnership's affairs, his wrongful appropriation of partnership property, and his breach of a contract for the construction of an improvement on partnership property.

By agreement dated February 1973, Hooper and three other persons formed a limited partnership for the purpose of acquiring and developing two tracts of land, parcels A and B, in Durham, North Carolina, as a shopping center. Hooper and Charles S. Warner signed the partnership agreement as both general and limited partners and were joined by Eugene R. House and S. Parker Oliphant (as nominee for John W. Warner) as limited partners. House later assigned his interest to Charles Warner and Oliphant.

Anthony F. Musolino acquired a 15% interest as a limited partner on April 25, 1974. Hooper's combined interests were 45%, Charles Warner's interests totaled 15%, and Oliphant's interest was 25%.

In March 1974, the partnership engaged Hooper as general contractor to build a shopping center on parcel A at a contract price of $2,632,073. Hooper acquired performance bonds from Safeco Insurance Company of America (Safeco). On May 2, 1974, the partnership obtained a construction loan from Mortgage Investors of Washington (MIW) in the principal amount of $3,920,000, secured by a first deed of trust on the project. Hooper and his wife, Celeste Hooper, personally guaranteed repayment of the loan.

Thereafter, Hooper commenced construction but was unable to complete the project within the time prescribed in the construction contract and the loan agreement. By August 6, 1975, the project still was not complete, the partnership was in default under its loan agreement, and the partnership and MIW entered into a new loan agreement. In exchange for a forbearance of MIW's right to foreclose and continued disbursement of funds, each of the partners was required to contribute additional capital, and October 15, 1975 was set as the new date for completion.

By July 28, 1976, Hooper had not yet completed construction of the project, MIW had instituted foreclosure proceedings, and the parties entered into a "workout" agreement. In exchange for MIW's agreement to terminate the foreclosure proceedings, to take over completion of the project, and to disburse the balance of the loan proceeds, the partnership promised to deposit $200,000 with MIW for use in paying delinquent debts and in completing construction of the project. In a "buyout" agreement required by the workout agreement and executed the same day, Hooper purchased Charles Warner's partnership interests for $11,000. This raised Hooper's com-

bined interests to 60% of the partnership. In the buyout agreement, Hooper agreed to indemnify Warner against all claims arising from his status as a general partner and to "assume all liability for . . . all debts of the . . . Partnership". Also as a part of the workout agreement, the partnership and MIW, joint obligees on Hooper's payment and performance bonds, released Safeco from all liability as surety in exchange for Safeco's payment of $200,000 to the partnership and MIW. The partnership relinquished its rights in that payment in satisfaction of its obligation to deposit $200,000 with MIW.

The project finally was completed September 1, 1978, but because rental income from the completed units was insufficient to satisfy the partnership's obligations under its loan agreement, MIW foreclosed on the project. Parcel A, as improved, was bid in at the foreclosure sale for $4,500,000. The balance due on the construction loan was more than $5,000,000. In a "settlement" agreement dated October 22, 1979, MIW released the partnership and the guarantors, Eugene and Celeste Hooper, from any liability for the deficiency in exchange for the Hoopers' payment of $340,000 to MIW. MIW also foreclosed under a separate deed of trust on parcel B, the unimproved tract adjacent to the shopping center. Hooper and his wife subsequently acquired that parcel from MIW for a stated consideration of $130,000.

By bill of complaint filed August 12, 1977, Musolino sought an accounting of the affairs of the partnership. Musolino named Hooper, Charles Warner, and the partnership as party respondents. Musolino alleged that Hooper, in his role as a general partner, "failed to discharge his fiduciary duties" and "misused, misappropriated and diverted" partnership funds, and in his role as contractor, failed to perform the work as required under the construction contract. Hooper denied the substantial allegations of the bill, and the chancellor referred the matter to a commissioner in chancery. The decree instructed the

commissioner to file a complete accounting of the assets and liabilities of the partnership from the time of its inception and to ascertain whether Hooper or Charles Warner owed any monies to the partnership or to Musolino.

By order entered September 29, 1978, the court found that Hooper had made no effort to respond to Musolino's discovery requests and ordered Hooper to file answers to interrogatories and to produce the books and records of the partnership. Hooper failed to comply with the order, and on November 6, 1978, the court entered a new discovery order, assessed costs and legal fees against Hooper, and took under advisement the question whether to award judgment against Hooper in the amount of Musolino's investment in the partnership.

In April 1980, the commissioner entered an order requiring Hooper to produce all the records and books of the partnership. After taking depositions, the commissioner submitted his first report on April 2, 1982, finding that:

> Eugene Hooper has failed to make a complete accounting of the assets, liabilities, receipts and disbursements of all the funds of the partnership, nor can a complete accounting be made because of his failure to comply with the Order of this Commissioner requiring the production of all books, papers, vouchers, documents and writings necessary to provide such a complete accounting . . . .

Based on the books and records available to the commissioner, he concluded that Hooper had commingled his own accounts and funds with those of the partnership.

The commissioner further found that the construction contract between Hooper and the partnership was a "fixed-price" contract, but that insurance and construction bond premiums, electricity costs, cost overruns, subcontractors'

expenses, other construction costs, and certain personal obligations all were treated by Hooper as partnership construction costs. The commissioner stated that:

> Eugene Hooper's neglect of the project, poor management, unavailability during critical periods during the construction, and failure to respond to job needs had a serious and adverse effect, on the project, causing delays which resulted in problems with anchor tenants, subcontractors and the leasing program, directly causing inability to obtain permanent financing and also causing failure of the project.

In addition, the commissioner reported that Hooper had released Safeco from its obligations to the partnership as surety on the performance bonds and had failed to dissolve the partnership (as required by the partnership agreement) when Hooper became the sole general partner. These actions by Hooper, the commissioner concluded, "amounted to a conversion to his own personal use of all the partnership assets, and coupled with the express terms of the partnership agreement, make Eugene Hooper liable to . . . Musolino for the return . . . of his investment".

Finally, the commissioner reasoned that, in purchasing the interests of Charles Warner in the partnership, Hooper "assumed all liability for all the unpaid bills and accounts outstanding against the partnership as of that date, and assumed liability for all debts of the partnership and defense of all lawsuits which have or might arise against the partnership".

Hooper filed exceptions to virtually every factual and legal finding of the commissioner, and the court sustained several. Musolino filed four exceptions to the report. The court sustained each and remanded the cause to the commissioner with instructions to determine whether Hooper was liable:

1. For the damages sustained by the Partnership as a result of Mr. Hooper's neglect of his partnership obligations;

2. For the sums due as a result of Mr. Hooper's failure to perform the contractual obligations of the partnership;

3. For those sums which Mr. Hooper took from the Partnership in excess of those due him; and

4. For the Partnership property lost due to Mr. Hooper's failure to perform both partnership and contractual obligations.

After considering memoranda of law, the commissioner filed his second report dated October 11, 1983. The commissioner rejected Hooper's claims of credits for capital contributions on the ground that Hooper had not documented any such contributions. The commissioner also found that Hooper's financial exhibit provided "no more substantial purpose at times than to show activity in and relating to the various accounts" and that "reconciliation of the accounts [was] impossible."

The commissioner found that the partnership suffered a loss of two parcels of land due to Hooper's negligence and his failure to perform partnership and contractual obligations. With respect to the first and fourth inquiries on remand, the commissioner ascertained that "Parcel A, lost by foreclosure, is valued at $4,500,000.00, and Parcel B, which was converted by Mr. Hooper to his own personal use, is valued at $130,000.00". Hooper could claim no offsets or deductions against these amounts, the commissioner reported, because Hooper had assumed a personal obligation in the buyout agreement to pay the partnership debts.

With respect to the second inquiry, the commissioner found that "$3,800,000.00 [in partnership funds] was known to be contributed to construction costs as of December,

1976," and that, as of that date, construction of the project was not complete. The commissioner ruled that Hooper owed the partnership the entire amount without any credit for the value of labor and materials furnished by him to construct the project because he "did not substantially perform the contract or complete the job in a manner which would entitle him to any equitable remedies."

Regarding the third inquiry, the commissioner concluded that Hooper's failure to keep and produce accurate financial records prevented a calculation of "those sums which Mr. Hooper took from the Partnership in excess of those due him".

Hooper filed exceptions to the second commissioner's report, challenging, among other things, the evaluation of parcel A; the finding that Hooper was entitled to no equitable remedies; and the conclusion that the partnership was entitled to damages for both the full value of the improved property *and* the cost of the improvements. On July 20, 1984, the court delivered its opinion from the bench. The court ruled that the commissioner was correct in evaluating parcel A without any offset for encumbrances because Hooper, in his buyout agreement with Charles Warner, had assumed liability for all the partnership debts, including the construction loan. The court reasoned that the partnership had suffered a loss of the full value of the property because Hooper, and not the partnership, was obligated to pay off the encumbrances. The court also found that, because the commissioner reported that Hooper was not entitled to any equitable remedies, the partnership's recovery of both the value of the improved property and the cost of the improvements was not a double recovery; Hooper was liable for his negligence as a general partner on the one hand, and for his breach as a contractor on the other.

In a final decree entered on July 26, 1984, the chancellor ordered Hooper to pay to the partnership $8,430,000 with

interest from the date of judgment and to pay Musolino costs. Additionally, the decree dissolved the partnership, directed Musolino and John Warner to wind up its affairs, and ordered Hooper to secure an appeal bond for $3,372,000, representing 40% of the judgment—the combined interests in the judgment to which Musolino and John Warner would be entitled absent any outstanding debts owed by the partnership. Finally, the decree authorized the court's general receiver to sell Hooper's partnership interests should Hooper fail to satisfy the judgment within 21 days.

We granted Hooper an appeal limited to consideration of the questions whether the chancellor erred in determining the amount of the judgment, in entering judgment in favor of the partnership, and in authorizing the sale of Hooper's partnership interests. Section 8.05 of the partnership agreement provides that the rights of the partners shall be governed and construed according to the law of North Carolina, and because that state is reasonably related to the purpose of the agreement, we will apply the parties' choice of substantive law. *See Tate* v. *Hain,* 181 Va. 402, 410, 25 S.E.2d 321, 324 (1943); *C.I.T. Corporation* v. *Guy,* 170 Va. 16, 22, 195 S.E. 659, 661 (1938).

Under settled choice-of-law principles, however, we will apply our own law in matters that relate to procedure. *Willard* v. *Aetna,* 213 Va. 481, 482-83, 193 S.E.2d 776, 778 (1973); *Baise* v. *Warren,* 158 Va. 505, 508, 164 S.E. 655, 656 (1932). Our review of the record discloses that Hooper failed to object to the partnership as a party to the suit and, thereby, failed to preserve the question whether the chancery court lawfully could render judgment in favor of the partnership. Consistent with our contemporaneous objection rule, we will not consider the argument Hooper makes for the first time on appeal. Rule 5:25.

Hooper's primary contention on appeal is that the judgment entered below will "unjustly enrich the limited partners at Hooper's expense." Hooper argues that Musolino and John Warner "invested less than $350,000 in a partnership venture that completely failed [and] that was never even completed by the Partnership". Acknowledging that, under the appeal as limited, Hooper's liability for the partnership's failure is not subject to challenge, Hooper asserts that the limited partners' recovery should be confined to the amount of their investment.

In support of his position, Hooper cites *Roper* v. *Thomas*, 60 N.C.App. 64, 298 S.E.2d 424 (1982), *petition denied*, 308 N.C. 191, 302 S.E.2d 244 (1983), and Section 59-10 of the General Statutes of North Carolina.[1] Subsection (a)(2) of that statute authorizes a suit for an accounting, and Hooper contends that the *Roper* court held that, whenever a partnership has failed and realized no profit, "the remedy of the limited partners is restricted, by statute [§ 59-10(b)], to the return of their investment."

We do not share Hooper's interpretation of the decision in *Roper*. The prayer for relief in *Roper* sought nothing more than a return of the limited partner's investment.

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[1] § 59-10. Rights of a limited partner.

(a) A limited partner shall have the same rights as a general partner to

(1) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,

(2) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(3) Have dissolution and winding up by decree of court.

(b) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in G.S. 59-15 and 59-16.

And as the court in that case recognized, it was not reviewing a suit for an accounting brought pursuant to § 59-10 but an action at law for the general partners' breach of the partnership agreement, their negligence, and their misappropriation of partnership funds. 60 N.C.App. at 70, 298 S.E.2d at 427. As relevant to this case, the decision in *Roper* merely stands for the proposition that, in cases in which a court finds that a general partner's negligence has proximately caused injury to a limited partner, the limited partner is entitled to recover his investment. *Id.* at 74-75, 298 S.E.2d at 430-31. We hold that the possibility of an eventual recovery by Musolino and John Warner above their investments is not inconsistent with the decision in *Roper*, with any North Carolina statute, or with any provision of the partnership agreement defining a general partner's liability to the partnership or to another partner.[2]

Hooper challenges the circuit court's assessment of $4,500,000 against him as the value of the improved prop-

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[2] In pertinent part, the partnership agreement provides:

> 2.02(c) . . . . No General Partner shall have personal liability for the repayment of the capital contributions of the Limited Partners except as provided in Section 2.05 and for misconduct, fraud or negligence not otherwise provided in Section 8.02.
>
> . . . .
>
> 8.02 . . . . Neither the Partnership nor any Partner shall have any claim against any General Partner by reason of any act or omission of the same provided that such acts or omissions were performed in the good faith belief that he was acting within the scope of his authority under this Agreement and that the General Partner was not negligent or guilty of misconduct with respect to such actions or omissions. Except as provided herein or required by law, no General Partner shall have any obligation or liability to any other Partner or to make any advance, to, or contribution to the capital of, the Partnership.

Nothing in these provisions would limit a recovery by a limited partner to the return of his capital contribution.

erty lost to foreclosure. He points out that the proceeds of sale were applied against the balance due on the partnership's loan and that, in consideration of his payment on the deficiency, MIW extinguished the debt and released the deed-of-trust lien on the property. Nevertheless, the circuit court held that Hooper was liable to the partnership for the entire value of the improved property and "refused to offset that amount by the Partnership indebtedness which was extinguished by MIW's purchase." According to Hooper, "While the court recognized that, under ordinary circumstances, the Partnership would have had no equity in the shopping center property, it held that Hooper in his agreement with Charles Warner of July 28, 1976 . . . had 'assumed all liability for all of the partnership's debts' and that the debt to MIW 'should have been paid by Hooper, thereby relieving the partnership of the debt it had owed on the property.' "

Hooper contends that the court misconstrued his buyout agreement with Charles Warner. We agree. A contract must be construed as a whole to determine the parties' intent with respect to specific provisions. *Jackson* v. *Bumgardner*, 318 N.C. 172, 186, 347 S.E.2d 743, 751 (1986); *Crosby* v. *Bowers*, _____N.C.App. _____, _____, 361 S.E.2d 97, 102 (1987). The specific provision underlying the chancellor's ruling is set out in the margin.[3] Looking to the buyout agreement in its entirety, we find that when Hooper purchased Warner's interests in the partnership, he agreed to assume Warner's obligations as a general

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[3] The total of all unpaid bills and accounts outstanding against the . . . Partnership as of the date of this Agreement . . . whether in the form of a bill or account, or whether having been reduced to a lawsuit for collection on a bill or account . . . shall be assumed by Purchaser, and Purchaser shall assume all liability for these and all debts of the . . . Partnership, and defend all lawsuits which have or might arise against the . . . Partnership, and/or Charles S. Warner, as a General Partner or individually in connection with the . . . Partnership.

partner and to hold Warner harmless from any liability arising out of his status as such. Prior to the buyout, Hooper and Warner, as general partners, were jointly and severally liable for all debts of the partnership, *see* N.C. Gen. Stat. §§ 59-9, -45 (1982), but "[i]t is well settled that each partner has the right to insist that partnership assets be applied in payment of partnership debts . . . [when] the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained," *Wolfe* v. *Hewes*, 41 N.C.App. 88, 91, 254 S.E.2d 204, 206 (citing *Casey* v. *Grantham*, 239 N.C. 121, 126, 79 S.E.2d 735, 738 (1954)), *petition denied*, 298 N.C. 206 (1979). By entering into the buyout agreement, Hooper assumed no liability for partnership debt other than that owed by Warner. In essence, Hooper assumed no obligation that he, as a general partner, did not already have; he merely lost his right to contribution from a fellow general partner. *See Econo-Travel Motor Hotel Corp.* v. *Taylor*, 45 N.C.App. 229, 233-34, 262 S.E.2d 869, 872-73, *rev'd on other grounds*, 301 N.C. 200, 271 S.E.2d 54 (1980).

In addition to his liability as a general partner, Hooper, together with his wife, had personally guaranteed the partnership's repayment of the loan. When the proceeds of the sale of parcel A were applied to the construction loan, a deficiency remained. Pursuant to the settlement agreement, Hooper and his wife paid $340,000 to MIW, thereby relieving himself and his wife from their obligations as guarantors, the partnership from its obligation on the loan, and Hooper from his obligation as the sole general partner to pay any debt left unsatisfied by partnership assets. With the debt extinguished, the obligation respecting the loan that Hooper had assumed under the buyout agreement was discharged. Because the partnership had no equity in the property, it lost nothing in the foreclosure. Accordingly, we will reverse that portion of the decree that awarded the partnership damages for the unencumbered value of parcel A.

Addressing the breach of contract claim, the chancellor awarded the partnership $3,800,000, the amount known to have been contributed by the partnership to construction costs on the project. Hooper contends that the amount of the award "is grossly inflated and unquestionably incorrect" in that, inconsistent with a proper measure of damages for breach of contract, the "award gives Hooper no credit for the labor, materials and other expenditures made by him in constructing the shopping center and which contributed to most if not all of its value."

In response, appellees say that "Hooper paid himself $3,800,000 for work he had agreed to do for $2,600,000 but never did." Appellees argue that Hooper's contention that the court applied an inappropriate measure of damages ignores the fact that the breach-of-contract issues arose in a suit requiring a fiduciary to account.[4] In such a suit, appellees assert, a partner who has taken funds from the partnership has the burden of proving his right to the funds. They point out that, in the trial court, Hooper based his entitlement to the funds solely on an allegation of a "cost-plus" construction contract. The commissioner found and the court agreed that Hooper had committed himself to a "fixed-price" contract. Appellees conclude that, having failed to carry his burden of proof, Hooper was not entitled to any of the funds he took and must return them to the partnership. Also, having failed substantially to perform under the construction contract, Hooper was not entitled to the price fixed in that contract or to any credit for the cost of labor and materials supplied.

The chancellor concluded that, because Hooper had voluntarily assumed fiduciary duties to the partnership, his

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[4] In fact, Hooper argues on brief, as he did in his petition for appeal, that the court properly should not have awarded damages for breach of contract in a suit for an accounting. His petition was refused as to this assignment of error, and we decline to rule on a question not presently before the Court.

treatment of the construction business and the partnership as one entity "left himself open as part of his fiduciary duties to account in one proceeding for the issue of whether he complied with the terms of the construction contract and resultant damages to the partnership." In this suit for an accounting, the court found that Hooper had failed to account for the funds contributed to construction costs because Hooper had not substantially performed under the contract, and had not kept and produced records of the partnership's funds sufficiently separate and distinct from construction accounts to enable the commissioner to determine what part of the $3,800,000, if any, Hooper had earned.

We hold that Hooper, as a fiduciary in his role as managing partner, had the burden of demonstrating his entitlement to funds taken from partnership accounts. *See McNeill* v. *McNeill,* 223 N.C. 178, 181, 25 S.E.2d 615, 617 (1943); *Stone* v. *McClam,* 42 N.C.App. 393, 400, 257 S.E.2d 78, 83, *petition denied,* 298 N.C. 572, 261 S.E.2d 128 (1979). The fact that Hooper also was the general contractor who had breached a contract with the partnership did not transform the chancery proceedings below into an action at law for damages in which the partnership, as plaintiff, would have had the burden of proving its damages. If such were the case, Hooper, by deliberate nonfeasance of his duty as managing partner to keep the records and books, could frustrate the partnership's efforts to retrieve any funds he may have converted to his personal use. We decline to permit Hooper to benefit from his failure to carry out his fiduciary duties. Finding overwhelming evidence in the record to support the court's ruling that Hooper failed to perform his covenants as general contractor and produced no records and books sufficient to justify the funds contributed by the partnership to construction costs, we hold that the chancellor did not abuse his discretion in ordering Hooper to return

$3,800,000 to the partnership, and we will affirm that portion of the decree.

The court also held that Hooper was liable to the partnership for $130,000, the value of parcel B reflected in the deed to the Hoopers. Hooper's claim in the trial court that he was holding the property in trust for the partnership was unsupported by the evidence and contradicted by the deed. Finding that Hooper had failed to account for the taking of partnership property, the court awarded judgment in favor of the partnership for its value. Hooper did not contest the point on brief or in oral argument before this Court, and we will uphold the chancellor's ruling.

Finally, Hooper assigns error to the court's authorization of the sale of his partnership interests to satisfy the judgment in favor of the partnership. Pointing out that the judgment against him is the partnership's sole asset; and that a purchaser of his interest would acquire merely the right to enforce 60% of the judgment against him, Hooper contends that the only persons likely to bid are Musolino, John Warner, and Hooper. Hooper argues that if he "is unable to 'outbid' Musolino and John Warner for his own interest in the judgment, then Musolino and John Warner will be able to leverage their 40% interest in the judgment . . . into a 100% interest". Hooper complains that the court should not have placed him in the position of having to bid for the right to collect a portion of the judgment from himself.

We see no prejudice in the chancellor's ruling. Hooper is a judgment debtor. As such, all his assets, including his interests in the partnership, are subject to public sale in satisfaction of the judgment. The post-judgment remedy authorized in the decree merely eliminates the requirement of a writ of *fieri facias*. In the exercise of its equity jurisdiction, a court is afforded broad discretion in fashioning complete and just relief, *Sumner* v. *Staton*, 151 N.C.

198, 201-02, 65 S.E. 902, 904 (1909); *Chamberlain* v. *Beam*, 63 N.C.App. 377, 380, 304 S.E.2d 770, 772-73 (1983), and we hold that the chancellor did not abuse his discretion in authorizing a public sale of Hooper's interests in the partnership.

The judgment of the trial court will be affirmed in part and reversed in part. We will modify the decree to exclude recovery for the unencumbered value of parcel A and will enter final judgment here in favor of the partnership for $3,930,000.

*Affirmed in part, reversed in part, modified, and final judgment.*

## APPENDIX B

**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 4th day of March, 1988.

**Record No. 841603**
**Circuit Court No. C-54683**

---

EUGENE N. HOOPER,

*Appellant,*

against

ANTHONY F. MUSOLINO, *et al.*,

*Appellees.*

**Upon a Petition for Rehearing**

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 15th day of January, 1988 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:

Clerk

## APPENDIX C

**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 15th day of January, 1988.

Record No. 841603
Circuit Court No. C-54683

---

EUGENE N. HOOPER,

*Appellant,*

against

ANTHONY F. MUSOLINO, North Duke Mall Limited Partnership, CHARLES S. WARNER and JOHN W. WARNER,

*Appellees.*

---

**Upon an appeal and suspension of judgment from a judgment rendered by the Circuit Court of Fairfax County on the 26th day of July, 1984.**

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For reasons stated in writing and filed with the record, the Court is of opinion that there is error in part in the judgment appealed from. Accordingly, the judgment is affirmed in part, reversed in part and modified to exclude recovery for the unencumbered value of parcel A.

Proceeding to enter final judgment, it is ordered that North Duke Mall Limited Partnership recover of the appellant the sum of $3,930,000, together with interest thereon to be computed at the rate of twelve per centum per annum from July 26, 1984 until June 30, 1987, and

at the rate of eight per centum per annum from July 1, 1987 until paid.

This order shall be certified to the said circuit court.

A Copy,
Teste:

## APPENDIX D

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

---

## IN CHANCERY NO. 54683

---

ANTHONY F. MUSOLINO

*Complainant,*

v.

NORTH DUKE MALL LIMITED PARTNERSHIP, *et al.*

*Defendants.*

### FINAL DECREE AND JUDGMENT

This matter came on to be heard on the 20th and 25th days of July, 1984 upon the pleadings filed herein, the evidence taken before the Commissioner in Chancery to whom this case was referred, the reports of the Commissioner and the previous rulings, orders and decrees entered in this cause.

AND IT APPEARING TO THE COURT after completion of the accounting conducted by the Commissioner between the parties hereto, consideration of the entire record and argument of counsel that the Exceptions filed by Defendant Hooper to the Second Commissioner's Report should be over-ruled and that said Report should be sustained except as to the date from which interest should run,

AND IT APPEARING TO THE COURT that Defendant Hooper caused the loss of partnership property; to wit, Parcel A valued at $4,500,000 and Parcel B valued at $130,000 and breached his construction contract with the

Partnership thereby damaging the Partnership in the amount of $3,800,000,

AND IT FURTHER APPEARING TO THE COURT that Defendant Hooper agreed and stipulated on December 23, 1983 that post-judgment interest would run from the date that is thirty-five (35) days prior to the actual date of entry of this Final Decree.

NOW, THEREFORE, for the reasons given *ore tenus* on July 20, 1984 and July 25, 1984 it is

ADJUDGED, ORDERED AND DECREED that Defendant Hooper pay to North Duke Mall Limited Partnership the sum of Eight Million Four Hundred Thirty Thousand Dollars ($8,430,000.00) plus interest at the judgment rate from June 20, 1984 until payment;

ADJUDGED, ORDERED AND DECREED that Defendant Hooper pay to Complainant Musolino the sum of $8,814.46 to reimburse him for costs, with interest at the judgment rate from June 20, 1984 until payment;

[Deleted Material]

ADJUDGED, ORDERED AND DECREED that Charles W. Warner has no liability to the Partnership or any of its partners, and nothing shall be taken from him; that Eugene N. Hooper shall take nothing from the Partner ship or any of its partners; that the Partnership is dissolved; and that partners, Anthony F. Musolino and John W. Warner, are directed to wind up one partnership affairs pursuant to Section 50-37, *Code of Virginia*, to collect all amounts due to or for the benefit of the Partnership and make distributions to the partners as their interest may appear;

ADJUDGED, ORDERED AND DECREED that execution of this judgment may be suspended in accordance with Section 8.01-676 upon the filing by Eugene N. Hooper, or someone for him, of an appeal bond within ten (10)

days from the date of entry of this Decree, with corporate surety, in the amount of $3,372.000.00; and it is further

ADJUDGED, ORDERED AND DECREED that if no such bond is posted and this judgment remains unsatisfied twenty-one (21) days from the date of entry of this Decree, Mr. Hooper's interest in the North Duke Mall Limited Partnership shall thereupon be charged with the payment of the unsatisfied amount and the General Receiver of this Court may then proceed to sell his partnership interest for cash in accordance with Sections 50-28 and 50-65, *Code of Virginia.* All expenses of receivership including reasonable compensation of the receiver shall be a cost of collection and charged to Mr. Hooper.

THIS DECREE IS FINAL as to the judgment herein granted and the findings of non-liability as to those other than Eugene N. Hooper and is continued for such further matters as may from time to time arise concerning the dissolution and distribution of partnership assets.

The transcripts shall be a part of the record of this Ca

ENTERED this 26th day of July, 1984.

/s/ RICHARD J. JAMBORSKY
JUDGE

SEEN AND EXCEPTED TO:

/s/ J. SHAUGNESSY for
DEXTER S. ODIN
Counsel for Complainant
Anthony F. Musolino

/s/ J. SHAUGNESSY for
HARVEY B. COHEN
Counsel for Complainant
John W. Warner

Complainants Musolino and Warner, by counsel except to the Trial Court's decision not to award interest on the amounts awarded from July 28, 1976 as provided by the Commissioner

DONALD CHEATHAM
Counsel for Defendant
Charles W. Warner

SEEN AND EXCEPTED TO
(IN EACH AND EVERY PART):

/s/ DOUGLAS J. SANDERSON
DOUGLAS J. SANDERSON
Counsel for Defendants
Eugene N. Hooper and
North Duke Mall
Limited Partnership

## APPENDIX E

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

---

## IN CHANCERY NO. 54683

---

ANTHONY F. MUSOLINO,

*Complainant*

VS.

NORTH DUKE MALL LIMITED PARTNERSHIP, *et al*,

*Defendants*

**SECOND COMMISSIONER'S REPORT**

TO: THE HONORABLE RICHARD J. JAMBORSKY, JUDGE OF THE CIRCUIT COURT OF FAIRFAX COUNTY

By letter opinion of March 22, 1983, this cause was remanded back to this Commissioner for further reporting to the Court. On May 12, 1983, all Counsel of Record met with this Commissioner, at which time it was stipulated that all of the proffer exhibits of the Defendant Eugene Hooper would be admitted into evidence and become a part of the full record for review and consideration. This Commissioner concurs with the suggestion of Counsel for Defendant Hooper (see page one (1) of Defendants' Memorandum dated May 27, 1983) that such stipulation be formalized for the record of this cause.

Counsel for the parties have submitted memoranda to this Commissioner on the matter of damages and said memoranda are attached to this report.

Counsel for the Defendants filed fifty (50) exceptions to this Commissioner's Report dated April 2, 1982. The Court overruled Defendants' exceptions one (1) through twenty-nine (29), thirty-three (33), thirty-five (35) through thirty-nine (39), and forty-five (45) through fifty (50).

The Court sustained Defendants' exceptions thirty (30) through thirty-two (32), thirty-four (34), and forty (40) through forty-four (44). The Court also sustained exception thirty-six (36) in part, requesting this Commissioner to acknowledge that he dealt with that issue and to report how and why he resolved it as he did.

The Court also sustained the Complainant's exceptions one (1) through three (3) and four (4) so long as it was not duplicative of one (1).

The Following findings and report are submitted on the areas outlined above and as directed by the letter opinion of March 22, 1983:

## A. DEFENDANTS' EXCEPTIONS

(1.) In the matter of numbers thirty (30) through thirty-two (32) and thirty-four (34), the Court has stated to this Commissioner that any amounts for which the Defendants may be liable for attorneys' fees, accountants' fees and architectural fees should and would be determined by the Court. No findings or report then are submitted on these areas.

(2.) Exceptions forty (40) through forty-four (44) deal with the matter of the Defendant Hooper's proffer exhibits. Since the Complainant's Counsel agreed and stipulated to the admission of these exhibits as part of the full record, no findings or report then are submitted on these areas.

(3.) Exception thirty-six (36) alleges that this Commissioner failed to include in his report a finding that

Defendant Hooper has paid or obligated himself to pay $1,412,112.92 on the project and a finding that said funds are not recoverable in any amount and therefore represent total losses to the Defendant Hooper; furthermore, the Defendants except to the failure of the Court to find that said payments were not required of the Defendant in his capacity as general partner and far exceed the amount of the investment and losses sought herein by the Complainant. This Commissioner did deal with and consider this issue, which is represented by Defendant Hooper's Exhibit No. 60 and the sources cited therein.

This exhibit represents a flow of transactions and lists the accounts and checks either transferred to the Mall or Hooper Developer's payroll accounts, or miscellaneous expenditures on behalf of the Mall. Combined here are deposits that may have been made to Mall accounts, deposits made to construction accounts and deposits or expenditures made with respect to personal accounts. No distinctions were made between Hooper's expenditures as a contractor or as a partner; all construction costs were treated as partnership construction costs.

This Commissioner previously found and reported that Mr. Hooper handled this project in such a manner that his accounts and funds, and those of the partnership were co-mingled. Accounting information provided in Exhibit No. 60 and the sources cited therein provide no more substantial purpose at times than to show activity in and relating to the various accounts. Deposit slips, back-up checks and other dependent records were missing from almost all the accounts, thereby making reconciliation of the accounts impossible.

Supporting documentation for loans Mr. Hooper claimed he made to the Partnership were not produced nor were the alleged loans clearly established or segregated. Some of the claimed contributions to capital were applied against Mr. Hooper's debts as the contractor and the expenses

incurred because of his misfeasance. Other funds claimed as capital contributions were actually obtained by releasing his Construction Bond which was in favor of the partnership, and a trade off of assets of the Mall.

In addition, Mr. Hooper, by the Agreement of July 28, 1976, personally assumed all liability for the unpaid bills and accounts outstanding as of the date of the agreement and all debts of the Partnership.

This Commissioner then did consider the claim of Mr. Hooper as to the alleged payments totaling $1,412,112.92. Said claim was rejected by this Commissioner on the basis that it was not supported or established by clear, convincing, competent and credible evidence.

## B. COMPLAINANT'S EXCEPTIONS

(1.) For the damages sustained by the Partnership as a result of Mr. Hooper's neglect of his partnership obligations.

The damages sustained were a loss of the partnership property of two parcels of land. Parcel A, lost by foreclosure, is valued at $4,500,000.00, and Parcel B, which was converted by Mr. Hooper to his own personal use, is valued at $130,000.00 for a total of $4,630,000.00. Simple interest at six percent (6%) per annum should be allowed on this amount from July 28, 1976, the date upon which Mr. Hooper assumed all the liabilities of the partnership. No offsets or deductions should be allowed to Mr. Hooper because of his personal obligation—the assumption of the partnership debts. And this Commissioner so finds.

(2.) For the sums due as a result of Mr. Hooper's failure to perform the contractual obligations to the partnership.

$3,800,000.00 was known to be contributed to construction costs as of December, 1976. Even then, construction was not complete. This sum, then, with simple interest at

six percent (6%), is due the partnership from Mr. Hooper in his capacity as General Contractor. This Commissioner further finds that Mr. Hooper, as Contractor did not substantially perform the contract or complete the job in a manner which would entitle him to any equitable remedies.

(3.) For those sums which Mr. Hooper took from the partnership in excess of those due him.

Even the inclusion of Defendant Hooper's previously excluded exhibits does not result in a full and complete accounting by Mr. Hooper of the assets, liabilities, receipts and disbursements of all of the funds of the partnership. Necessary documents and financial records as listed in this Commissioner's previous report have not been provided; there has been a total failure to make a full accounting, in that all the financial transactions have not been placed into evidence. This Commissioner again finds that Mr. Hooper breached his fiduciary and contractual duty to keep books and records and have annual audits of the partnership affairs, and has failed to produce all the evidence necessary to render a strict and full account.

This Commissioner then is unable to find and report to the Court the total sums which Mr. Hooper took from the partnership in excess of those due him from the present evidence and record in this cause.

(4.) For the Partnership property lost due to Mr. Hooper's failure to perform both partnership and contractual obligations.

This exception appears to be duplicative of number one (1) above in that the partnership property lost was the two parcels of land.

## C. OTHER

This Commissioner did not reach any different conclusions as a result of reviewing and considering previously excluded exhibits of the Defendant Hooper.

Respectfully Submitted,

/s/ JOHN J. KARCHA
JOHN J. KARCHA, Esq.
Commissioner in Chancery
P.O. Box 369
Fairfax, VA 22030

Date: 10/11/83

## APPENDIX F

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

---

## IN CHANCERY NO. 54683

---

ANTHONY F. MUSOLINO,

*Complainant*

vs.

NORTH DUKE MALL LIMITED PARTNERSHIP, *et al*,

*Defendants*

### COMMISSIONER'S REPORT

Pursuant to a Decree of Reference entered in this cause on April 3, 1978, a 1st Meeting of the Parties/Attorneys, pursuant to Rule 2:18 of the *Rules of the Supreme Court* was held in my office at 3977 Chain Bridge Road, Fairfax, Virginia, on February 15, 1980, after first serving Notice of said meeting on Counsel for all Parties.

Hearings were then conducted by this Commissioner in my office, after Notice was served on Counsel for the Defendants by Counsel for the Complainant, on April 8, 9, May 21, 22, 28, June 19, 23, July 4 and 24, 1980, at which times, in the presence of Counsel for all Parties, I took the depositions of Eugene N. Hooper, Bruce H. Engelmann, John Evans, Jr., Frank Hanson, Alfred D. Stuart, Richard P. Eakin, Karen Wiley, Charles S. Warner and Anthony F. Musolino. Said depositions are submitted herewith, and after consideration of same, Exhibits received, credibility of the witnesses, together with the pleadings in this cause, the following findings and report are submitted on the areas outlined in the Decree of Reference:

1. *A complete accounting of the assets and liabilities of North Duke Mall Limited Partnership and of the receipt and disbursement of all funds of said partnership from its inception to the present.*

The North Duke Mall Limited Partnership, a North Carolina Limited Partnership with its principal place of business in Virginia, was created by an Agreement dated February, 1973, as amended, for the purpose of acquiring real property in Durham, North Carolina, to develop the property for a shopping center mall.

Eugene Hooper was at all times a general partner, as was Charles Warner, who withdrew from the partnership in July, 1976, when he transferred and assigned all his interest in the partnership to Eugene Hooper.

Anthony Musolino was at all times, from April 23, 1974, a limited partner and was later the project architect.

The partnership entered into a Construction with Eugene Hooper, as the General Contractor; the contract, dated March 22, 1974, which provided for the construction of the mall, was a *fixed price* contract and called for the commencement of the work within thirty (30) days after the execution of the contract and for the completion within twelve (12) months or so thereafter as progress of development and diligent prosecution of the work permitted.

Eugene Hooper was also the contractual Construction Manager for the project.

The mall was never completed according to the terms of the contract as amended, and was lost through foreclosure by the construction funds lender whose note was secured by a deed of trust against the partnership property.

Eugene Hooper has failed to make a complete accounting of the assets, liabilities, receipts and disbursements of all the funds of the partnership, nor can a complete ac-

counting be made because of his failure to comply with the Order of this Commissioner requiring the production of all books, papers, vouchers, documents and writings necessary to provide such a complete accounting said Order having been served on Counsel for Eugene Hooper on April 2, 1980.

Some of the documents obviously not provided were those in connection with the land purchase, such as deeds, deeds of trust, closing costs and settlement sheets. Full annual audit reports, required by the partnership agreement, were not provided. Others not provided include, but are not limited to, Federal, State and Local Tax Returns, shopping center leases, complete documents of the bankruptcy proceedings, construction cost control records, daily construction logs, projects time schedules, cost accounting records, qualification criteria for subcontractors, contracts with subcontractors, *all* deposit slips and checks on all banking accounts, contracts for tenants' custom work, W-2 Forms for employees' checks for salaries written on partnership accounts, mechanics' liens filed on the project, statements of attorneys' fees paid, documents in connection with condemnation proceedings against part of the property, etc.

Eugene Hooper has maintained that subsequent to the *fixed-price* construction contract, a *cost-plus* contract was entered into between himself as general contractor and the partnership. *This Commissioner does not make such a finding.* Evidence and testimony at the hearings would indicate, and this Commissioner does so conclude, that Mr. Hooper handled this project in such a manner that his accounts and funds, and those of the partnership were comingled. His accountants did not distinguish or breakout Mr. Hooper's debts as a contractor and the legitimate obligations of the partnership. All construction costs were treated as partnership construction costs, e.g., construction bond premiums and insurance, electricity costs, cost overruns, subcontractor obligations, personal obligations of Mr.

Hooper, etc. Mr. Hooper's accountant admitted he had not reviewed or even considered the construction contract in stating opinions and making reports on the partnership accounts or charges against them for cost overruns, tenant improvement work, and construction extras costs.

Classification and completeness of the documents provided and submitted cannot be ascertained. Accounting information provided served no more substantial purpose at times than to show activity in and relating to the various accounts.

2. *Whether any monies are due either the Complainant or North Duke Mall Limited Partnership, or both, from Eugene N. Hooper or Charles S. Warner, or both.*

Eugene Hooper's neglect of the project, poor management, unavailability during critical periods during the construction,and failure to respond to job needs had a serious and adverse effect, on the project, causing delays which resulted in problems with anchor tenants, subcontractors and the leasing program, directly causing inability to obtain permanent financing and also causing failure of the project.

In addition, Eugene Hooper entered into various agreements resulting in the release of the SAFECO Insurance Companies from their obligations under his Construction Performance and Labor and Material Payment Bonds, and riders, which were in favor of the partnership.

Eugene Hooper failed to dissolve the partnership, according to the terms of the partnership agreement, when he become the sole general partner after the Agreement of July 28, 1976, when Charles Warner assigned and transferred all his partnership interest to Mr. Hooper.

All the above actions amounted to a conversion to his own personal use of all the partnership assets, and coupled with the express terms of the partnership agreement, make Eugene Hooper liable to the Complainant, Anthony Mu-

solino, for the return to Mr. Musolino of his investment plus interest, Attorneys' Fees, Accounting Fees, Architectural Fees and Court Costs, including, but limited to, Commissioner in Chancery and Court Reporter Fees. Since the exact figures on these amounts were submitted in the Complainant's Brief (See Commissioner's Exhibit #2), and even though in Affidavit form, are not all in evidence, the amounts to be awarded the Complainant should be determined by the Court.

By virtue of the "buy-out" agreement of July 27, 1976, between Eugene Hooper and Charles Warner, Mr. Hooper assumed all liability for all the unpaid bills and accounts outstanding against the partnership as of that date, and assumed liability for all debts of the partnership and defense of all lawsuits which have or might arise against the partnership and/or Charles Warner as a general partner or individually in connection with the partnership.

Consequently, there is due Charles Warner, or his Counsel, Donald T. Cheatham, from Eugene Hooper, all attorney's fees and costs in connection with this proceeding, the exact amount to be determined by the Court (See Commissioner's Exhibit #1 and attachment thereto).

3. *Whether any injunctive relief is required to protect the interests of the Complainant or of North Duke Mall Limited Partnership.*

Injunctive relief and/or the appointment of a receiver may be needed in connection with other matters in this proceeding, but only if requested by the Complainant (See Commissioner's Exhibit #2). No such request has been made to date.

Respectfully Submitted,

/s/ JOHN J. KARCHA
JOHN J., KARCHA, Esq.
Commissioner in
Chancery
P.O. Box 369
Fairfax, Virginia 22030

Date: April 2, 1982

COMMISSIONER IN CHANCERY FEES PAID BY OR DUE FROM:

COMPLAINANT MUSOLINO— $786.00 Paid 6/6/80
$631.25 Paid 8/12/80
$1,666.66 Paid 4/16/82

DEFENDANT HOOPER— $793.75 Paid 6/6/80
$631.25 Paid 9/10/80
$1,666.67 Paid 5/13/82

DEFENDANT WARNER— $800.00 Paid 6/6/80
$631.25 Paid 9/4/80
$1,666.66 UNPAID

/s/ JOHN J. KARCHA
JOHN J. KARCHA, Esq.
Commissioner in Chancery

(COURT REPORTING EXPENSES AND CHARGES FOR COMMISSIONER'S HEARINGS— $4,288.55. See Copy of Invoice attached hereto.)

Supreme Court, U.S.
FILED
JUL 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1995

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE N. HOOPER,

*Petitioner,*

vs.

ANTHONY F. MUSOLINO, NORTH DUKE MALL LIMITED PARTNERSHIP, CHARLES S. WARNER, and JOHN W. WARNER

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondents
Anthony F. Musolino
and John W. Warner, individually and as
Court-Appointed Representatives of
North Duke Mall Limited Partnership

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## JURISDICTION

Although Petitioner claims jurisdiction under 28 U.S.C. § 1257 (presumably section three of that statute), he fails to frame a substantial federal question which was raised or decided by the Virginia Supreme Court. To the contrary, Petitioner complains about state substantive and procedural law which, though properly applied, he contends resulted in a denial of "due process." The basis for this argument is that, as a general partner in an accounting action, he was required to account for funds taken from partnership accounts. Second, after he was found to have breached his obligations to the partnership and judgment was rendered against him, he was required to post a bond of $3,370,000 to forestall collection during an appeal. The appeal resulted in judgment being entered against him in the amount of $3,930,000 plus interest from July 26, 1984.

Not only did Petitioner fail to account for partnership monies taken, he never posted the bond of which he now complains. No due process arguments were asserted before the State courts. Only now, for the first time, does Petitioner attempt to frame a federal constitutional "due process" argument. Accordingly, the Petition should be denied for want of a federal question.

## STATEMENT OF THE CASE

The Bill of Complaint filed by Anthony F. Musolino ("Musolino") on August 12, 1977 named the Petitioner, Eugene N. Hooper ("Hooper"), Charles S. Warner and the North Duke Mall Limited Partnership ("Partnership") as parties and prayed for an accounting and the recovery of monies due either Musolino

or the Partnership. (Bill of Complaint attached as page A-1) The Bill of Complaint specifically alleged that Hooper failed to discharge his fiduciary duties as general partner; used partnership funds to pay for non-Partnership debts; over-paid himself under the March 22, 1974 construction contract he had with the Partnership; paid himself for work not provided for under the 1974 construction contract; and otherwise diverted and misappropriated Partnership funds. Hooper answered the equity suit and consented to a Decree of Reference (attached as page A-4), referring the case to a Commissioner in Chancery to ascertain and report to the Court on:

> 1. A complete accounting of the assets and liabilities of North Duke Mall Limited Partnership and of the receipt and disbursement of all funds of said partnership from its inception to the present.
>
> 2. Whether any monies are due either the Complainant or North Duke Mall Limited Partnership, or both, from Eugene N. Hooper or Charles S. Warner, or both.

The Commissioner conducted a lengthy evidentiary hearing. On the basis of the Commissioner's report, the Trial Court found that Hooper, a fiduciary with the burden of demonstrating his entitlement to funds taken from the Partnership, not only failed to account for monies paid for construction of an incomplete mall, but failed to keep and produce books and records of the Partnership sufficient to render a complete account of the Partnership affairs. Before the Commissioner, Hooper argued that the $3.8 million he (as general partner) paid himself as contractor was jus-

tified because his construction contract with the Partnership was a "cost-plus" contract. The Commissioner and the Court rejected this argument and specifically found a fixed price contract.

In July 1984, the Trial Court awarded the Partnership judgment in the amount of $8,430,000, but set an appeal bond in the amount of only $3,372,000.

Hooper voluntarily filed a Petition for Reorganization under Chapter 11 of the Bankruptcy laws in October 1984. In his schedules, he listed his net worth at approximately 17 million dollars. That case has been converted to a Chapter 7 liquidation proceeding due to Hooper's failure to comply with a Court Order and unauthorized transfer of property. After the Chapter 11 filing, the Supreme Court of Virginia denied Petitioner's request for a reduction of the amount of the bond suspending execution on the judgment.

After granting a limited appeal, the Supreme Court of Virginia affirmed the decision of the Trial Court, but reduced the judgment to $3,930,000, plus interest from July 1984. No constitutional or federal question issues were raised by any party or decided by Supreme Court of Virginia.

## REASONS FOR DENYING THE WRIT

**I. Lack of Substantial Federal Question.**

A diligent review of Hooper's Petition fails to disclose any federal question presented for this Court's review. Although Hooper states he has been denied "due process" and lists several constitutional amendments upon which he relies, he fails to make any such constitutional argument in his Petition. Moreover, none of the numerous memoranda and briefs in this

lengthy case make any reference to constitutional defects. Accordingly, this Court lacks jurisdiction under 28 U.S.C. § 1257(3) to hear this case.

A generous reading of the Petition is that Hooper contends he was denied "due process" because (1) he was not apprised of the civil claims against him and thus had no opportunity to properly defend and (2) because a bond of $3,370,000 was required to be posted to forestall collection on a judgment ultimately entered by the Supreme Court of Virginia in the amount of $3,930,000.

The first of these "federal questions" not only is based on incorrect facts, but never was preserved by Hooper. The Bill of Complaint specifically requests an accounting of all Partnership assets and liabilities. It charges Hooper (as general partner and a fiduciary) with having mismanaged and misappropriated Partnership funds, and having paid himself monies in excess of those allowed under a construction contract between the Partnership and Hooper (as general contractor) for construction of a shopping mall being developed by the Partnership. Hooper agreed to a Decree of Reference which directed the Commissioner to hear evidence and render to the Court a complete accounting of all assets of the Partnership, including any monies due the Partnership from Petitioner. (A-4.) Hooper now complains about that to which he had previously consented. Such a circumstance can not be permitted to create a due process argument.

An accounting action in Virginia is a well-established equitable procedure in which all accounts among the parties are settled. *Harris v. Magee*, 7 Va. (3 call) 502 (1803); *Iron City Bank v Isaacsen*, 158 Va. 609, 164 S.E. 520 (1932); *Shield v. Brown*, 166 Va. 596,

186 S.E. 33 (1936). The action is founded on the fiduciary relationship between the parties and requires every partner to account for all of his wrongs, including liabilities for assets received but not accounted for, as well as conversions, comingling, negligence and contractual deficiencies. In this action, Hooper, as a fiduciary, bore the burden of establishing his entitlement to funds taken from Partnership accounts, which the lower courts have ruled he failed to do. There is no doubt that Hooper was aware that one of the items for which he was to account was the construction contract under which he paid himself millions of dollars for incomplete construction of a shopping mall lost to foreclosure. Indeed, a substantial amount of the nine days of testimony before the Commissioner consisted of Hooper trying to establish that his construction contract was a "cost-plus" contract and not a fixed price contract. For Hooper to tell this Court he was denied "due process" because he had no notice of the claim begs reality.

The other "federal question" argument advanced by Hooper is that because he was required to post a bond of $3,372,000 to forestall collection by the Partnership during the appeal, he somehow was denied "due process". Initially, it must be noted that Hooper never posted the bond of which he now complains. Moreover, he voluntarily availed himself of the protection of the bankruptcy laws (listing a net worth of approximately 17 million dollars) before waiting for the Virginia Supreme Court to rule on his motion to reduce the amount of his bond. That request was predicated upon a Virginia statute, and no constitutional argument was suggested. It is difficult to find

harm, however, as the bond was still less than the final judgment of $3,930,000 plus interest.

The appeal bond amount was not set arbitrarily. In initially setting the appeal bond at $3,372,000, the Trial Court conservatively estimated the minimum recovery by the partners against Hooper, disregarding any creditors of the Partnership who would have to be paid before any distribution could be made to the partners. The alleged difficulty in someone with a net worth of $17,000,000 posting a bond of $3,370,000 on a judgment of $8,430,000, affirmed on appeal at $3,930,000 plus interest, simply does not constitute a violation of due process.

If Hooper seriously questioned the constitutional impropriety of the prior proceedings, he had many chances to raise the issue and have it decided before resort to this Court. Having not done so, this Court has no jurisdiction to hear these issues for the first time now. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962).

**B. Lack of Any Rule 17 Considerations.**

The Petition is devoid of any of the considerations usually governing the granting of a review of certiorari as set forth in Rule 17 of the *Rules of the Supreme Court of the United States*. No conflict of the ruling of the Virginia Supreme Court with other courts is articulated. No important question of federal law which needs resolution by this Court is argued. To the contrary, the Virginia court ruled on a particular set of facts under a long standing local procedure.

At best, Petitioner is arguing that this Court should review the Virginia decision because he feels it is

wrong. However, Hooper's legal argument that "return of investment" is the sole liability of a general partner is unconvincing and has been rejected by the state court as unsubstantiated by any authority. No court of justice will ever be heard to say that a general partner can convert partnership loan proceeds totalling millions of dollars to his own use or convey partnership property to himself and be required to do no more than return the partners' investment. The Virginia court ruled accordingly under applicable state law and there is no compelling reason for this Court to review that decision.

## CONCLUSION

Respondents request this Court to deny the Petition for want of a federal question and lack of any important issue needed to be decided by this Court.

Respectfully submitted,

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# APPENDIX

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | | |
|---|---|---|
| ANTHONY F. MUSOLINO,<br><br>Complainant,<br><br>v.<br><br>NORTH DUKE MALL LIMITED PARTNERSHIP<br><br>SERVE: The General Partners Individually and for the Partnership,<br><br>AND<br><br>EUGENE N. HOOPER<br>7115 Leesburg Pike<br>Falls Church, Virginia,<br><br>AND<br><br>CHARLES S. WARNER<br>White Post, Virginia<br><br>Defendants. | * | IN CHANCERY NO. 54683 |

**BILL OF COMPLAINT**

COMES NOW the Complainant, ANTHONY F. MUSOLINO, for an accounting pursuant to the Uniform Limited Partnership Act, Section 50-53 (1), and for his grounds he states the following:

1. Attached hereto and incorporated by reference is the North Duke Mall Limited Partnership Agree-

ment (the AGREEMENT) executed by the signators thereto on February 12, 1973, and amended on April 25, 1974.

2. Pursuant to the AGREEMENT, the property identified in Paragraph 1.03 was acquired, funds were borrowed, construction commenced, and all things required of him as a Limited Partner were fully performed by the Complainant, ANTHONY F. MUSOLINO.

3. The General Partner, EUGENE N. HOOPER, on behalf of the Limited Partnership entered into a contract with himself, for the construction of the project. A copy of the contract dated March 22, 1974, is attached and incorporated by reference.

4. Defendant, EUGENE N. HOOPER, as General Partner-Contractor, failed to discharge his fiduciary duties to the Partnership, and in the course of his interdealings he did, inter alia, the following:

(a) Partnership funds were used for the purpose of discharging the business debts of Eugene N. Hooper.

(b) Partnership funds were paid to Eugene N. Hooper for work, labor and materials which were not provided and/or performed in accordance with his obligations as General Partner-Contractor to the Partnership.

(c) Funds of the Partnership were misused, misappropriated and diverted from Partnership purposes.

(d) In derogation of his fiduciary obligations, Eugene N. Hooper agreed on behalf of the Partnership as its General Partner with himself as Contractor for

the Partnership, to undertake the obligations which were of benefit to him as the Contractor.

(e) Eugene N. Hooper has paid to himself as the Contractor sums of money for the performance of work for which he as the Contractor had already been fully compensated. Eugene N. Hooper also paid himself to correct work which was not in the first instance performed in accordance with the terms of the Contract.

4. The Defendants, EUGENE N. HOOPER and CHARLES S. WARNER, have failed to render the financial reports, provide the audits, and render requested accountings to the Complainant, ANTHONY F. MUSOLINO, as required either by law or pursuant to the Agreement of the parties or in deference to his request for the same.

WHEREFORE, Complainant prays that an accounting of the assets of the Partnership be immediately had, that such monies from the General Partners as fiduciaries as may be due either the Complainant or the Partnership be recovered, that such injunctive relief as may be required to protect either the Complainant or the Partnership's interest be issued as the circumstances may from time to time require, and that the Complainant have such other and further relief as to the Court may deem just and proper.

ANTHONY F. MUSOLINO

BY: /s/
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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | | |
|---|---|---|
| ANTHONY F. MUSOLINO, | * | |
| | * | |
| Complainant, | * | |
| | * | |
| v. | * | |
| | * | |
| NORTH DUKE MALL LIMITED | * | IN CHANCERY NO. 54683 |
| PARTNERSHIP, *et al.*, | * | |
| | * | |
| Defendants. | * | |
| | * | |

**DECREE OF REFERENCE**

THIS CAUSE came on to be heard this 3rd day of April, 1988, upon the Bill of Complaint and all other pleadings previously filed herein, and

IT APPEARING TO THE COURT that proper service of process has been obtained upon all of the Defendants and that this cause has duly matured for hearing and is now properly upon the active docket of this Court, it is therefor

ADJUDGED AND DECREED that this cause be, and it hereby is, referred to John J. Karcha, one of the Commissioners in Chancery of this Court, who shall ascertain and report to the Court as follows:

1. A complete accounting of the assets and liabilities of North Duke Mall Limited Partnership and of the receipt and disbursement of all funds of said partnership from its inception to the present.

2. Whether any monies are due either the Complainant or North Duke Mall Limited Partnership, or both, from Eugene N. Hooper or Charles S. Warner, or both.

3. Whether any injunctive relief is required to protect the interests of the Complainant or of North Duke Mall Limited Partnership.

ENTERED this 3rd of April, 1988.

/s/ Richard J. Jamborsky
JUDGE

PRESENTED:

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